Supreme Court, U.S.
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No. 90-1322

In The

Supreme Court of the United States

October Term, 1990

SNOW MOUNTAIN PINE COMPANY,

Petitioner,

-against-

THE PUBLIC UTILITY COMMISSION OF THE STATE OF OREGON

Respondents.

and

C.P. NATIONAL CORPORATION, a California corporation

Respondent.

and

OREGON TRAIL ELECTRIC CONSUMER'S COOPERATIVE, INC.,

Intervenor/Respondent

REPLY IN SUPPORT OF CERTIORARI

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REPLY TO OPPOSITION TO GRANT OF CERTIORARI

The State of Oregon Does Not Oppose Review.

The State of Oregon has been seeking for seven years to determine the meaning of federal law in this case. At times during the Snow Mountain cases, the counsel for the Oregon PUC have supported the lawfulness and accuracy of the 1983 avoided costs orders sought to be enforced by Snow Mountain, while the Attorney General's Office has requested that the Oregon court's ignore those orders and rates. It is a support of the Petition For Writ of Certiorari that its Attorney General has decided not to oppose certiorari with a filing.

C.P. National Corporation and Oregon Trail Electric Consumers' Cooperative, Inc. alone have filed a Joint Brief in opposition to the Petition for Writ of Certiorari.[1]

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[1] C.P. National Corporation's Rule 29.1 Statement fails to properly disclose that CPN has been merged into a subsidiary of Alltel, Inc., a corporation of the state of Delaware which owns utility subsidiaries in numerous states. Those subsidiaries are not named for the court as required. Alltel shares are listed for trading on the New York Stock Exchange.

Oregon Trail Electric Consumer's Cooperative, Inc., purchased CPN's utility assets in Oregon during the pendency of this case and agreed to perform the obligations of CPN to Snow Mountain.

Review is Sought Timely:

Federal Appellate Jurisdiction Was Created By The Decision In *Snow Mountain II* not Snow Mountain I

The Reply Brief contains numerous factual errors which can serve only to confuse the Court and its clerks.[2] However, the basic proposition of the opposition is the assertion inter alia that Snow Mountain should have brought its appeal to this court after the first decision of the Oregon Court of Appeals against Snow Mountain (and the subsequent refusal by that Court and the Oregon Supreme Court to grant review or reconsideration).[3]

This is incorrect. No appeal could have been brought at that time. Appeal became possible and proper only after the Oregon P.U.C. acted upon the remand from these decisions and proceeded to ignore entirely the lawfully established avoided costs set in 1983.[4]

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[2] An erroneous reference is made in the joint brief at page 9 to a second case filed in Multnomah County in the same action. Such case was filed in Marion County by reason of the parties' agreement that jurisdictional issues required the filing as a protective measure. This complaint was not pursued after the jurisdictional issue was resolved. The same was true of the FERC complaint which confirmed that no jurisdiction existed in any federal forum for resolution of the PURPA issues.

[3] See, page 6 of Joint Brief in Opposition.

[4] Since these avoided costs were established lawfully and were adopted and followed by CPN and the Oregon P.U.C., they were, as a matter of law, "actual" avoided costs.

The first decision of the Oregon Court of Appeals contained ambiguous language which stated both that: (i) Snow Mountain be afforded a right under federal law only to "actual avoided costs" existing on July 6, 1983; and (ii) language that federal law required that the 1983 posted avoided costs rates be used "as a starting point" for the determination of "actual avoided costs" vis a vis the Snow Mountain facility by considering price adjusting factors, set forth in federal law, which adjust the generic prices for "project specific" characteristics.[5] Remand was ordered to set "actual avoided costs." Nothing in this statement of federal law was erroneous. No harm had yet come to Snow Mountain by reason of the decision of the Oregon Court of Appeals in *Snow Mountain I. That* decision affirmed the Circuit Court's reversal of the Order 84-895 being contested by Snow Mountain.[6]

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[5] These are such matters as whether the project is on line during system emergencies, the line losses avoided on the system by reason of the placement of the new generation facility and the like.

[6] The Per Curiam decision cited at page 11 of the Joint Brief states: Snow Mountain Pine Company appeals from a decision of the circuit court affirming an order of the Public Utility Commission (PUC) on remand from this court. *Snow Mt. Pine Company v. Maudlin*, 84 Or. App 590, 734 P.2d, *rev den* 303 Or. 591 (1987). It contends that PUC's decision is inconsistent with our remand instructions or, in the alternative, that our opinion and remand instructions were wrong [contrary to federal law]. We adhere to our opinion and conclude that the PUC complied with our instructions on remand.

"Affirmed." (102 Or. App at 689, 795 P.2d at 611).

Snow Mountain adopts the citation as part of the Petition.

Snow Mountain did previously ask the Court of Appeals and the Oregon Supreme Court to clarify its remand order. Snow Mountain agreed that the remand Order required use of the 1983 rates as a starting point, but asked that the adjustments not be made again because they had been made already in the contract provisions created by the Order 84-895.[7] These Courts declined to grant review. However, under Oregon law, this denial of review is not a decision on the merits. In fact, under Oregon law, it is error of law, to consider these decisions to be decisions on the merits. In *1000 Friends of Oregon v. County Board of Commissioners, Benton County*, 284 Or. App. 41, 46 and 47, 584 P.2d 1371, 1373 and 1374 (1978) (Justice Linde), the Oregon Supreme Court found that a denial of review is not a ruling on the merits, citing *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 70 S.Ct. 252 (1950) (J. Frankfurter). As such, no appeal could yet be brought by Snow Mountain until after the remand which followed denial of review.

C.P. National and Oregon Trail in their Joint Brief pretend that the decisions not to grant review in Snow Mountain I by the Supreme Court were on the merits and that such triggered the time to appeal to this court.

The simple truth is that the Oregon P.U.C. could have followed the decision in *Snow Mountain I* and started with the 1983 avoided costs. It could have complied with the remand order and created **actual avoided costs for Snow**

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[7] PURPA contracts provide for lower payments if power provided is not firm or peak power; and provide for payment during system emergencies; provided a payment or credit for line losses and reflect the factors set forth in federal law.

Mountain by amending the contract and otherwise making adjustments to the 1983 price schedules as allowed by federal law for project specific factors. Had the Oregon P.U.C. done so, there would be no flagrant violation of the federal law or program. Certainly, no appeal could have been taken.

This appeal is required because the Oregon P.U.C. took the case on remand in 1988 and established "actual" avoided costs for this project as of July 1983 which were not based in any way upon the lawful avoided costs posted by the Oregon P.U.C. in 1983 for use by Snow Mountain. No consideration was given on remand to any factors for adjusting prices. The Oregon P.U.C. simply adopted new philosophies and methodologies regarding how to estimate C.P. National future power costs, and it simply ignored the previous avoided costs orders adopted pursuant to federal law.

It was this action which aggrieved Snow Mountain. It is from the affirmance of these Orders that appeal is taken to this Court.

CP National Corporation's Brief Is Inaccurate. Its Arguments Support The Grant of Certiorari

In every contest with CPN in *Snow Mountain I and II*, the Petitioner relied upon federal law. CPN argues that this was not so; but attaches to its Joint Brief an index of authorities from one of many Snow Mountain briefs. The attached index cites to numerous federal regulations. Often this reliance upon federal law was pointed out by CPN to the Oregon Courts in a manner which sought to

generate offense by the state court. CPN's assertion that Snow Mountain did not cite federal authority is incorrect.

The Supreme Court is presented with a joint brief which relies for argument upon the federal definition of avoided costs as being the cost which a utility would incur for generation or purchase from another source but for the purchase from a co-generation facility. In 1983 the Oregon P.U.C. found as a fact that CPN could not expect to purchase power form any other utility for the next 35 years. There was a finding that CPN was not an all-requirements utility. Further, the Oregon PUC adopted a policy that only setting avoided costs at the 'incremental' cost of building generation could encourage the construction of alternate energy supply facilities. As a consequence of these findings and policies, the Oregon PUC required CPN to file an estimate of generation costs parallel to those of Idaho Power Company, the lowest costs in the region.[8] In 1988, the Oregon PUC used the remand in this case to create a new 1983 guess of future costs for CPN. This new guess was based upon the assumption that CPN would continue to enjoy a low cost source of power for 35 years equal to historic average system costs of Idaho Power Company. This new estimate was labeled "actual avoided costs" and applied to Snow Mountain

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[8] Idaho Power Company did not participate in the nuclear power projects of the Washington Power Supply System. Idaho Power relies almost entirely upon cheap hydro-electric power, in large part supplied from dams built on the Snake River by the federal government.

alone. At the same time, the Oregon PUC was supporting CPN's applications to pass through to ratepayers the same 1982-3 avoided costs which it was and is paying to Snow Mountain's competitors. In these proceedings, CPN and the Oregon PUC were arguing that the old avoided costs could prove to be accurate over time and that they were lawful.

This is not just a case of political influence obtaining a decision contrary to federal law. It is not a unique situation wherein a Commission wanted to change the rules of the game for one lumber mill. It is not just a case of discrimination. It is a case in which the Oregon Courts have affirmed these actions and thus redefined PURPA in a way which removes the teeth from this federal energy program. These decisions give the states a veto power over the program by allowing state commissions to ignore or alter at any time the posted avoided costs which federal law assures to cogenerators as the major incentive for offers of power from alternative energy sources. Since PURPA, a multi billion dollar industry of independant power producers has been created. Many of these companies are publicly traded. Their future is based upon the continuation of the contracts and PURPA rights which they were promised by law. Their projects are financed typically with loans secured by the expected streams of PURPA payments. *Snow Mountain II* allows the states to alter these prices almost at will based upon new "guesses" and "estimates" made at any time. In the process, the projects may be subjected to regulatory type scrutiny and the owners subjected to long and expensive proceedings.

The prospect that Oregon Trail Electric Consumers Cooperative, Inc., will ask the Oregon PUC to alter the

prices in all of its contracts is not the invention of Snow Mountain. Unless, this case is reviewed and corrected, a blueprint for litigation will have been created to frustrate any prospective PURPA sale and a loophole opened which will very likely be used to pry utilities loose from their past PURPA obligations.

The Joint Brief cites to oral argument from another case brought by petitioner against CPN.[9] This other case was brought in the alternative to this PURPA enforcement action for the damages arising by reason of the unlawful conduct of CPN in refusing to offer to purchase or wheel petitioner's power; by reason of the promises of CPN which induced Snow Mountain to purchase turbines; by reason of the discrimination afforded Snow Mountain by CPN; and by reason of the refusals by CPN to otherwise comply with PURPA. The Joint Brief correctly indicates that the action was dismissed on motion by CPN. The dismissal was based upon the same decision which is now appealed to this Supreme Court on the theory advanced by CPN; namely, that the unlawful actions of CPN were retroactively excused by reason of the Oregon PUC's Order which retroactively lowered CPN's avoided costs (as if the 1983 avoided costs had never been posted and never been of effect.) In other words, Snow Mountain

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[9] Joint Brief at page 7.

has been left with no remedy by reason of the retroactive change in rates and law.

April 7, 1991

Respectfully submitted,

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